IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-5844

STANISLAUS ROBERTS,

Petitioner

vs.

STATE OF LOUISIANA,

Respondent

******

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

******

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TABLE OF CASES

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered on September 5, 1975, rehearing denied, October 9, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported at ____ La. _____, 319 So.2d 317 (1975), and is set out in Appendix A hereto, pg. 1a - 10a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on September 5, 1975, rehearing denied, October 9, 1975, and is set out in Appendix A hereto. Jurisdiction

of this Court is invoked under 28 U.S.C. Sec. 1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Louisiana violates the Eighth or Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Revised Statutes Annotated and Code of Criminal Procedure of Louisiana:

> LSA - R.S. 14:30 First Degree Murder.
> First degree murder is the killing of a human being:
> (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
> (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.
>
> For the purposes of paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.
>
> Whoever commits the crime of first degree murder shall be punished by death.
>
> LSA - R.S. 14:30.1 Second Degree Murder.
> Second degree murder is the killing of a human being:
> (1) When the offender has a specific intent to kill or to inflict great bodily harm; or
> (2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of twenty years."

LSA - R.S. 14:31 Manslaughter

"Manslaughter is:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years."

Art. 61 Louisiana Code of Criminal Procedure. District Attorney; Powers and Duties.

"Subject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute."

Art. 62 Louisiana Code of Criminal Procedure. Authority of attorney general; supervision of district attorney.

"The attorney general shall exercise supervision over all district attorneys in the state.

The attorney general has authority to institute and prosecute, or to intervene in any proceeding, as he may deem necessary for the assertion or protection of the rights and interests of the state."

Art. 691 Louisiana Code of Criminal Procedure. Dismissal of prosecution by district attorney.

"The district attorney has the power, in his discretion, to dismiss an indictment or a count in an indictment, and in order to exercise that power it is not necessary that he

obtain consent of the court. The dismissal may be made orally by the district attorney in open court, or by a written statement of the dismissal signed by the district attorney and filed with the clerk of court. The clerk of court shall cause the dismissal to be entered on the minutes of the court."

Art. 598 Louisiana Code of Criminal Procedure. Effect of verdict of lesser offense.

"When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial."

Art. 803 Louisiana Code of Criminal Procedure. Same; (General charge; scope;) Charge as to included minor offenses and plea of insanity.

"When a count in an indictment sets out an offense which includes other offenses of which the accused could be found guilty under the provisions of Article 814 or 815, the court shall charge the jury as to the law applicable to each offense..."

Art. 809 Louisiana Code of Criminal Procedure. Judge to give jury written list of responsive verdicts.

"After charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The list shall be taken into the jury room for use by the jury during its deliberation."

Art. 814 Louisiana Code of Criminal Procedure. Responsive verdicts; In particular

"A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are:

1. First Degree Murder:
   Guilty.
   Guilty of second degree murder.
   Guilty of manslaughter.
   Not guilty..."

Art. 817 Louisiana Code of Criminal Procedure. Qualifying verdicts.

"Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Louisiana, entered on September 5, 1975, affirming petitioner's conviction and death sentence. Petitioner, Stanislaus Roberts, was sentenced to death in the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, after being convicted of first degree murder.

On May 9, 1974, the Grand Jury of Calcasieu Parish issued an indictment against Stanislaus Roberts, charging him with the first degree murder of one Richard G. Lowe, who was employed as a gas station attendant in Lake Charles, Louisiana. The petitioner allegedly shot Mr. Lowe to death while engaged in the perpetration of an armed robbery.

The trial of the defendant commenced in the Fourteenth Judicial District Court, Parish of Calcasieu, on September 16, 1974. At the conclusion of the evidence, petitioner's jury was instructed that it could return verdicts of guilty of first degree murder, second degree murder, manslaughter, or not guilty. (A copy of said jury charges are attached hereto as Appendix B, pages 1b through 13b). The jury returned a verdict of guilty of first degree murder and the defendant was sentenced to death.

A motion for new trial was filed by the defendant and denied by the Trial Court.

On September 5, 1975, the Supreme Court of Louisiana affirmed petitioner's conviction and death sentence, with two Justices dissenting on the ground that the death sentence was imposed in violation of Furman v. Georgia, 408 U.S. 238 (1972). A timely rehearing petition was denied on October 9, 1975. On October 24, 1975, the Louisiana Supreme Court granted petitioner a reasonable stay of execution and a delay of 45 days in which to prepare and file in this Honorable Court his application for a writ of certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his appeal to the Louisiana Supreme Court, petitioner urged five Assignments of Error. Assignment of Error No. 4 contended that the penalty of death, which was the sentence imposed upon the petitioner, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Assignment of Error No. 5 alleges that the statute under which the defendant was tried and convicted is unconstitutional because the jury is empowered to return a responsive verdict of second degree murder or manslaughter, which do not carry a death penalty; therefore, the jury maintains the power to apply the death penalty in a discriminatory manner in violation of the United States Supreme Court decision in the case of Furman v. Georgia, supra.

In rejecting the petitioner's claims, the Louisiana Supreme Court relied on the cases of State v. Hill, 297 So.2d 660 (1974) and State v. Selman, 300 So.2d 467 (1974). In each of these cases, the Louisiana Supreme Court concluded that capital punishment per se was not constitutionally proscribed and that the death penalty as applied in accordance with the pertinent Louisiana law was not violative of this Honorable Court's decision in Furman v. Georgia. Two Justices of the Louisiana Supreme Court dissented on the basis that Louisiana's system of responsive verdicts made the death penalty unconstitutional under Furman v. Georgia.

The aforementioned claims were raised again in a petition for rehearing, which was denied by the Louisiana Supreme Court on October 9, 1975.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF LOUISIANA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In the case of Furman v. Georgia, 408 U.S. 238 (1972), this Honorable Court held that the death penalty could no longer be imposed under statutory schemes which permit its arbitrary, rare, and irregular infliction.

Prior to the Furman decision, Louisiana juries were authorized to return a responsive verdict of "Guilty without capital punishment" after being instructed in a capital case. See Article 814 Louisiana Code of Criminal Procedure (1967). The juries thus maintained the authority to arbitrarily decide whether or not one charged with a capital crime would live or die. Realizing the inherent unconstitutionality of such authority, in light of the Furman decision, the Louisiana Legislature attempted to remove this fatal constitutional flaw in the State's verdict procedures by amending Article 814 C.Cr.P., so as to delete the responsive verdict of "Guilty without capital punishment", and Article 817 C.Cr.P. to remove the jury's power to qualify their verdict in a capital case.

Article 814 C.Cr.P. now contains the following responsive verdicts for the capital offenses of first degree murder, aggravated rape and aggravated kidnapping:

"1. First Degree Murder:
Guilty.
Guilty of second degree murder.
Guilty of manslaughter.
Not guilty. ***

8. Aggravated Rape:
Guilty.
Guilty of attempted aggravated rape.
Guilty of simple rape.
Not guilty.***

15. Aggravated Kidnapping:
Guilty.
Guilty of simple kidnapping.
Not guilty."

On each of the above described charges, the jury must be instructed on all of the responsive verdicts.

In answer to petitioner's contentions that the death penalty is cruel and unusual punishment per se and the statute under which petitioner was convicted is unconstitutional because the jury is empowered to return a responsive verdict of second degree murder or manslaughter, neither of which carries the death penalty, the Louisiana Supreme Court held:

> "...In the Hill case, this Court stated: 'The death penalty for murder, when the perpetrator has the intent to kill or inflict great bodily harm on more than one person, is neither barbarous nor disproportionate to the offense. See State v. Selman, supra; State v. Crook, 253 La. 961, 221 So.2d 473 (1969); 21 Am.Jur.2d, Criminal Law, Sec. 613, Page 563. In fact, the due process clause of the United States Constitution sanctions the death penalty when it is imposed with due process of law.
>
> 'We conclude, therefore, that capital punishment per se is not constitutionally proscribed.' 297 So.2d at 661.
>
> "We here hold that the death penalty mandated by R.S. 14:30 after conviction under subsection (1) is not unconstitutional per se.
>
> ******
>
> "Under Article 814 of the Louisiana Code of Criminal Procedure, the jury may render responsive verdicts for first degree murder which do not carry the death penalty. This court has held on two occasions that the power of the jury to bring in a responsive verdict for a separate though lesser included offense which does not carry the death penalty is not contrary to the United States Supreme Court decisions in Furman v. Georgia. In the case of State v. Hill, supra, this Court reversed the decision of the trial court which had quashed an indictment on the grounds that the power of the jury to return responsive verdicts without the death penalty was unconstitutional. This court stated: 'As provided in the statute, the death penalty is mandatory for first degree

murder. Article 817 of the Louisiana Code of Criminal Procedure, as amended by Act 125 of 1973, prohibits the qualification of the guilty verdict. If the defendant is found guilty as charged, the trial judge must impose the death penalty. The penalty cannot be applied in a discriminatory manner. See Furman v. Georgia, supra; State v. Holmes, 263 La. 685, 269 So.2d 207 (1972). It is true that Article 814, as amended by Act 126 of 1973, lists as responsive verdicts second degree murder, carrying a sentence of life imprisonment, and manslaughter, carrying a sentence of imprisonment up to 21 years. See LSA - R.S. 14:30.1; LSA - R.S. 14:31. The use of these lesser verdicts, however, is contingent upon the jury finding insufficient evidence to convict the defendant of first degree murder, with which he is charged.' 297 So.2d at 662.

"Likewise in the case of State v. Selman, 300 So.2d 467 (La. 1974), we affirmed a conviction for aggravated rape and the sentence of death. The Court pointed out that the Louisiana Legislature, following the ruling in Furman v. Georgia, enacted amendments to Article 814 and 817 of the Code of Criminal Procedure. These amendments remove the possibility that a jury could qualify its verdict with the words 'guilty without capital punishment.' In such a case the punishment would have been imprisonment at hard labor for life. As the statute is presently written, if a jury brings in a verdict of guilty of aggravated rape or guilty of violation of any of the other four sub-sections of R.S. 14:30, the jury does not have a choice of verdicts. The court in Selman stated: 'If the jury finds under the facts of the case that the accused is guilty of aggravated rape, the death penalty shall be imposed. On the other hand, if the jury finds under the facts of the case that the accused is either guilty of attempted aggravated rape or simple rape, they will render a verdict of guilty for that particular crime. We must bear in mind that attempted aggravated rape and simple rape are separate and distinct crimes with separate penalty provisions for each. The fact that death is the mandatory penalty for aggravated rape but not for the responsive verdicts of attempted aggravated rape and simple rape is of no moment. The sole determining factor as to which penalty will be imposed depends upon the particular crime for which the jury finds the accused guilty, if any. Therefore, we conclude that there is no discretion in the jury for the imposition of the death penalty where the accused is found guilty of aggravated rape.

'Hence, the present death penalty in Louisiana for aggravated rape is constitutionally permissible. It does not violate the Eighth and Fourteenth Amendments to the United States Constitution.' 300 So.2d at 473.

"We here affirm the Hill and Selman rulings and determine that this bill lacks merit." State v. Roberts, 319 So.2d 317 at 321 - 322, App. A at 7a - 10a.

It is respectfully submitted that the aforementioned decision of the Louisiana Supreme Court deprives the petitioner of rights guaranteed him by the Eighth and Fourteenth Amendments to the United States Constitution in that it condones and perpetuates a system wherein a jury, through its authority to render responsive verdicts in capital cases, may arbitrarily decide whether a man is to live or die. Certiorari should thus be granted by this Honorable Court to consider certain grounds upon which petitioner alleges that the system under which he was sentenced to death is violative of the Eighth and Fourteenth Amendments to the United States Constitution and contrary to the constitutional guidelines established by this Court in the case of Furman v. Georgia.

THE PERPETUATION OF ARBITRARY SELECTIVITY UNDER THE NEW LOUISIANA CAPITAL PUNISHMENT PROCEDURE

The decision of the Louisiana Supreme Court in the instant case warrants review insofar as that Court held that Louisiana statutory scheme relative to capital punishment, which was modified in 1973, satisfies the minimum requirement of Furman v. Georgia: that the penalty of death not be imposed arbitrarily.

It is the contention of petitioner that Louisiana's Criminal Procedure still contains selective mechanisms which produce an arbitrary and irregular infliction of the death penalty.

A. Prosecutorial Discretion

Article 61 of the Louisiana Code of Criminal Procedure provides:

> "Subject to the supervision of the Attorney General, as provided in Article 62, the District Attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when and how he shall prosecute."

The Louisiana Supreme Court has reiterated that "it is within the exclusive province of the district attorney, who is vested with full charge and control of every criminal prosecution instituted or pending in any parish where he is district attorney, to determine whom, when and how he shall prosecute." State v. Collins, 242 La. 704, 138 So.2d 546, 550 (1962). See also State v. Jourdain, 225 La. 1030, 74 So.2d 203, 204 (1954); Kemp v. Stanley, 204 La. 110, 15 So.2d 1, 20 (1943)(on rehearing); State ex rel. Bourg v. Marrero, 132 La. 109, 61 So. 136, 143-144 (1913); Pier 1 Imports, Inc. v. Pitcher, 270 So.2d 228, 229-230 (La.App. 1972).

The decisions whether and when it is appropriate to seek and prosecute a capital first degree murder indictment, or whether and when it is appropriate to proceed upon available lesser charges are thus committed to the unfettered discretion of the district attorney.

The district attorney also has unrestricted freedom to terminate criminal prosecutions. Article 691 of the Louisiana Code of Criminal Procedure provides:

> "The district attorney has the power, in his discretion, to dismiss an indictment or a count in an indictment, and in order to exercise that power it is not necessary that he obtain consent of the court. The dismissal may be made orally by the district attorney in open court, or by written statement of the dismissal signed by the district attorney and filed with the Clerk of Court. The Clerk of Court shall cause the dismissal to be entered on the minutes of the Court."

This broad power has been given judicial recognition on numerous occasions. The Louisiana Supreme Court has held, for example, that a trial judge has no power to require a district attorney to file a statement of reasons when he enters a nolle prosequi:

> "(t)here can be no doubt, of course, that the attorney general and the district attorneys of the State have absolute discretion to nolle prosequi any criminal case...(S)uch right has invariably been endorsed by the decisions of this Court. The broad powers vested in the district attorneys have long been recognized in our adjudications prior to the inclusion...(Article 691) in our Code of Criminal Procedure... 'In all stages of a criminal prosecution before a jury is impanelled the prosecuting attorney has an arbitrary control over his indictments, and may enter a nolle prosequi as to them, at pleasure, without the consent of the court or of accused.' " City of Lake Charles v. Anderson, 248 La. 787, 182 So.2d 70, 71 (1966). See also State v. Hingle, 242 La. 844, 139 So. 2d 205, 206 (1962)(on rehearing); State v. Broussard, 217 La. 90, 46 So.2d 48, 50 (1950); State v. Kavanaugh, 203 La. 1, 13 So.2d 366, 373 (1943).

Thus, certain statutory and judicial controls on the powers of the district attorney to decide whether to charge a person with a capital offense or some lesser non-capital offense are non-existent. These controls are necessary to help prevent an inconsistent and arbitrary selection of defendants to be prosecuted for capital crimes. Admittedly, some charging discretion must be left in the hands of the district attorney but where the death penalty is the possible consequence of judgments made in the exercise of that discretion, the Eighth Amendment as construed in Furman requires that the State must take all practicable steps to control and regulate such judgment so as to insure against the arbitrary selection of some men to die while others in like factual circumstances are permitted to live.

In Louisiana, there are no controls over the district attorney's selection between capital and non-capital offenses, which are, in many cases, overlapping. He may, therefore, act "arbitrarily" without violating any legal duty.

B. Jury Discretion

Where a trial judge instructs the jury on the capital crime of first degree murder, he is also "required", State v. Broussard, 217 La. 90, 46 So.2d 48, 52 (1950), by Article 814(A)(1), to instruct on the non-capital crimes of second degree murder and manslaughter. Consequently, in every capital case, although the jury is no longer empowered to qualify its first degree murder verdict with the recommendation of mercy, it may achieve the same result by simply convicting of one of the alternative non-capital crimes. A compelling argument against the constitutionality of such a statutory scheme for capital punishment was made by Mr. Justice Barham, in his dissent in the case of State v. Selman, 300 So.2d 467 (1974). Mr. Justice Barham dissented in the case at bar for the same reasons he assigned in Selman and State v. Hill, 297 So.2d 660 (1974); therefore, these reasons are applicable here:

> "It may be concluded then that the minimum requirement under Furman is that the statutory scheme which establishes the death penalty must eliminate the discretionary imposition of the sentence so that discriminatory practices against certain groups of persons cannot occur.
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> "While the responsive verdicts provided for in the Code of Criminal Procedure have dispensed with one qualifying verdict 'guilty without capital punishment,' other qualifying verdicts remain responsive to a charge for 'capital' crimes. A defendant charged with aggravated rape may, under the present law, have one of four verdicts returned against him which would be responsive to that charge. If the jury returns a verdict of 'guilty', the defendant suffers the death penalty. (La. R.S. 14:42). However, without accounting to anyone, the jury could return a verdict of 'guilty of attempted aggravated rape' and the defendant would be imprisoned at hard labor for not more than twenty years (La. R.S. 14:27); or the jury could return a verdict of 'guilty of simple rape', and the defendant would be imprisoned at hard labor for not less than one, nor more than twenty years (La. R.S. 14:43).

> "It is readily apparent that Louisiana does not have a 'mandatory death penalty' for a defendant charged with aggravated rape. The jury has a sliding scale for application of the penalty by returning a particular responsive verdict. The fact that the jury qualifies the verdict by classifying it as another offense makes no less real the total control left in the jury for deciding, upon any basis it chooses, whether one who has committed the crime of aggravated rape shall or shall not be sentenced to death. It is a common practice in this State, and I am sure throughout the nation, for juries to offer 'mercy' under certain charges by returning a verdict of 'guilty' to a lesser but included offense which is legally responsive to the charge for which the defendant was tried.
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> "I am of the firm opinion that Louisiana has not met the Furman standard of equal application of the death penalty in the case of aggravated rape.
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> ******
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> "Our responsive verdict scheme cannot be applied to the death penalty for aggravated rape when juries are permitted to determine death or life for the same offense against different individuals without any standards and without any accounting.
>
> ******
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> "I can make no distinction between qualification of a single verdict which permits discretion as to death or imprisonment and a responsive verdict scheme which may be used to discretionarily accomplish discriminatory application of the death penalty." State v. Selman, 300 So.2d at 475-476.

The arguments of Mr. Justice Barham were again rejected by a majority of the Louisiana Supreme Court for the same reasons as those relied upon in the Hill and Selman cases. Quoting from Hill, the Court held:

> "...It is true that Article 814, as amended by Act 126 of 1973, lists as responsive verdicts second degree murder, carrying a sentence of life imprisonment, and manslaughter, carrying a sentence of imprisonment up to twenty-one years. See LSA - R.S. 14:30.1; LSA - R.S. 14:31. The use of these lesser verdicts, however, is contingent upon the jury finding insufficient evidence to convict the defendant of first degree murder, with which he is charged." 297 So.2d at 662. State v. Roberts, 319 So.2d at Page 322, App. A. at 9a.

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Further quoting from Selman, the Court stated:

> "...The sole determining factor as to which penalty will be imposed depends upon the particular crime for which the jury finds the accused guilty, if any. Therefore, we conclude that there is no discretion in the jury for the imposition of the death penalty where the accused is found guilty of aggravated rape..." State v. Selman, 300 So.2d at 473; State v. Roberts, 319 So.2d at 322; App. A at 10a.

The fact that the jury must find the defendant guilty of a "particular" lesser crime, in order to spare his life, does not curtail its discretionary power in the least since the lesser offenses must be charged in every case regardless of the evidence and a conviction of a lesser offense which is "irrational" and unsupported by the evidence submitted at trial will not be reversed on appeal.

It is well established in the Louisiana jurisprudence that instructions on lesser offenses are "mandatory". State v. Broussard, 217 La. 90, 46 So.2d 48, 53 (1950). In addition, Article 809 of the Louisiana Code of Criminal Procedure further provides that "(a) after charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated." Article 814, specifying the permissible responsive verdicts to each charge, was enacted to:

> "remove the uncertainty theretofore involved in determining those offenses of less magnitude which were included within the offense charged. By setting out the permissible responsive verdicts, the Article greatly simplified the preparation and scope of the charge. At the same time the result was that the accused could more definitely determine in advance the verdicts which could result from any given charge." State v. Green, 263 La. 837, 269 So.2d 460, 463 (1972).

The failure of the trial judge to charge the jury with the law applicable to all of the offenses of which the accused can be found guilty under the indictment constitutes reversible error in Louisiana. See State v. Brown, 214 La. 18, 36 So.2d 624, 627 (1948).

The Louisiana Supreme Court has upheld the constitutionality of Louisiana's responsive verdict scheme because, according to the Court, the implementation of the lesser verdicts by the jury is contingent upon its finding insufficient evidence to convict the defendant of the capital offense of which he is charged. See State v. Hill, 297 So.2d 660, 662 (1974); State v. Roberts, 319 So.2d 317, 322 (1975), App. A at 9a. In practice, however, no restriction whatsoever is imposed upon the jury's power to find arbitrarily that some defendants are guilty of less-than-capital offenses despite evidence showing only the capital crime. The pertinent Louisiana Statutes support such arbitrariness and "irrational" verdicts to lesser offenses will not be disturbed on appeal to the State Supreme Court.

It is extremely impractical to contend that a jury will always function without the slightest amount of prejudice or arbitrariness and convict an individual of a capital crime instead of a lesser non-capital offense when the evidence so warrants. Under Louisiana's current responsive verdict procedures prejudice and arbitrariness may still rear their ugly heads. A jury in Louisiana may "without accounting to anyone" convict the defendant and spare him or kill him as it pleases. See State v. Selman, supra, 300 So.2d at 476 (dissenting opinion of Mr. Justice Barham).

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C. Executive Clemency

Article 4, Section 5 (E) of the Louisiana Constitution of 1974 provides:

> "(1) The governor may grant reprieves to persons convicted of offenses against the State and, upon recommendation of the Board of Pardons may commute sentences, pardon those convicted of offenses against the State, and remit fines and forfeitures imposed for such offenses. However, a first offender never previously convicted of a felony shall be pardoned automatically upon completion of his sentence, without a recommendation of the Board of Pardons and without action by the governor.
>
> (2) The Board of Pardon shall consist of five electors appointed by the governor, subject to confirmation by the Senate. Each member of the Board shall serve a term concurrent with that of the governor appointing him."

This particular constitutional provision is almost identical to Article 5, Section 10 of the Louisiana Constitution of 1921. The only important difference between the two provisions is that, under the present Constitution, the governor may pardon an individual upon the recommendation of the Board of Pardons while, under the Constitution of 1921, the governor was authorized to pardon an individual upon the written recommendation of the lieutenant governor, attorney general, and presiding judge of the court before which the conviction was had, or any two of them. In referring to the governor's power to pardon and commute sentences under the Constitution of 1921, the Court in Gaillard v. Cronvich, 263 La. 750, 269 So.2d 231, 232 (1972), held:

> "The only limitation on the governor's commutation power is that he act pursuant to a written recommendation of the commutation signed by any two of the following: the lieutenant governor, the attorney general and the presiding judge of the court before which the conviction was obtained. Once this recommendation is received, the governor has unlimited discretionary power to commute an applicant's sentence."

The discretionary power to pardon and commute sentences, which the governor enjoyed under the Constitution of 1921, was not in any way curbed or restricted by the new constitutional provision. If anything, the power was strengthened and increased by the fact that the governor no longer needs the written recommendation of certain elected officials, but rather the recommendations of five of his own appointees. And, of course, the discretion of the pardon board to make or decline to make recommendations is entirely unrestricted. Additionally, the clemency process is effectively immune from judicial review.

The inevitable result of this Louisiana system of commutation is that an arbitrarily selected number of those convicted of like crimes will be put to death. The chief executive and those who forward recommendations to him are bound by no criteria for deciding which among the condemned shall live or die. Standards for reviewing clemency applications may vary greatly as office holders are replaced - or there may be no standards at all - though life and death hang in the balance.

CONCLUSION

The questions which petitioner has raised are of extreme constitutional significance. It is respectfully submitted that Louisiana's post Furman capital punishment procedures fall short of the minimum requirements of the Eighth Amendment to the United States Constitution. Discretionary opportunities for imposition or avoidance of the death penalty are, in fact, as numerous and as unregulated as in the period prior to the Furman decision.

Petitioner, therefore, respectfully requests that certiorari be granted by this Honorable Court to review the decision of the Louisiana Supreme Court affirming petitioner's conviction and death sentence.

Respectfully submitted,

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BY: Richard P. Ieyoub
RICHARD P. IEYOUB

C E R T I F I C A T E

I HEREBY CERTIFY that a copy of the above and foregoing petition for writ of certiorari has been mailed, postage prepaid, to Frank T. Salter, Jr., District Attorney, Fourteenth Judicial District Courthouse, Lake Charles, Louisiana 70601.

Lake Charles, Louisiana, this 2nd day of December, 1975.

Richard P. Ieyoub
RICHARD P. IEYOUB

 Friday Sept 5, 1975

STATE OF LOUISIANA
Appellee

VERSUS NO. 56,090

STANISLAUS ROBERTS,
Appellant

Appeal from the Fourteenth Judicial District Court, Parish of Calcasieu, Honorable Earl E. Veron, Judge Presiding

CALOGERO, Justice.

Richard G. Lowe, an attendant of a gas station, was shot and killed during an armed robbery. Defendant Stanislaus Roberts was indicted for first degree murder. The armed robbery is alleged to have been perpetrated by defendant Roberts and one Calvin Arceneaux. After a trial by jury, Roberts was found guilty as charged and sentenced to death. Defendant appeals his conviction relying upon five assignments of error.

Assignment of Error No. 1.

Defendant argues that the trial court erred when it denied his motion for a new trial based upon the allegation that the state had failed to prove one of the elements of the crime.

Defendant was charged with first degree murder under R.S. 14:30(1) which provides in part that:

[illegible], J., dissents, being of the opinion that Louisiana's system of [illegible] verdicts [illegible] the death penalty unconstitutional under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. [illegible], 33 L.Ed.2d 346 (1972). [illegible]

> First degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery;
>
> * * *
>
> Whoever commits the crime of first degree murder shall be punished by death.

It is alleged that defendant was engaged in the perpetration of an armed robbery which is defined by R.S. 14:64:

> Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

Defendant argues that the state did not prove that the items taken from the gas station had any value or, alternatively, that the state did not prove that the items were taken from the immediate control of the victim Richard Lowe.

Richard Lowe was the night attendant at the gas station and was in sole charge of the station at the time of the incident. That which was taken from the premises was certainly taken from his control. State v. Refuge, [illegible] So.2d [illegible] (La. 1974).

The [illegible] shows that the perpetrators of the crime entered the [illegible] However, [illegible] a .38 Colt revolver from a [illegible] This gun was used to threaten, [illegible] It was the weapon employed by Roberts [illegible] He brandish- [illegible] of the [illegible]

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equivalent, three dollars. When the perpetrators departed the premises, they took with them the two guns and the two moneybags from the station office and the three dollars which they had received for the gas.

The .38 Colt revolver was introduced into evidence; the original owner of the gun testified that he had sold the gun to the owner of the station, but he did not specify the sale price. The other gun and the moneybags, however, were not introduced into evidence. (Presumably they were never recovered.) The state made no independent tender of proof relating to the monetary value of the guns or the bags. At issue here, then, is whether the state is required to put on affirmative proof of the value of the thing taken in order to satisfy R.S. 15:271 which requires that "[t]he plea of not guilty throws upon the state the burden of proving beyond a reasonable doubt each element of the crime necessary to constitute the defendant's guilt." State v. Brown, 301 So.2d 605 (La. 1974).

The phrase "anything of value" is defined very broadly by statute in Louisiana:

> "Anything of value" must be given the broadest possible construction, including any conceivable thing of the slightest value, movable or immovable, corporeal or incorporeal, public or private, and including transportation, telephone and [illegible] services, or any other service available for hire. [illegible] be construed in the broad popular sense of [illegible] synonymous with the [illegible]

Footnote 1.

The [illegible] that the [illegible] pumped three [illegible] The [illegible] motorist fled when he [illegible] pocketed the money.

traditional legal term "property." R.S. 14:2(2).

Certainly there is no question that the items taken here (an operable Colt police .38 caliber revolver which defendant used to kill the gas station attendant, another pistol, and two moneybags) would constitute something of value, certainly if "anything of value" is to be given "the broadest possible construction, including any conceivable thing of the slightest value."

However, we need not resolve the question of whether independent proof need be made of the specific value of the two guns and two empty moneybags inasmuch as the monetary equivalent of the gas taken is conclusively shown to have been three dollars, the amount which Arceneaux got for the gas from the startled customer.

This assignment of error lacks merit.

Assignment of Error No. 2.

Defendant assigns as error the trial judge's decision to allow the state to amend the indictment on the day of the trial. The pre-amendment indictment charged the defendant with the murder of Richard G. Lowe while defendant was engaged in an armed robbery. The state was allowed to amend the indictment[2] so that it would state that the same Richard G. Lowe was the victim of the armed robbery as well as the person murdered.

[2] The amendment was granted, over counsel's objection, after the trial judge had suggested to the district attorney that the amendment would not later be invalidated as in State v. Smith, 275 So.2d 733 (La. 1973). That case was overruled. State v. James, 305 So.2d 514 (La. 1974).

court had convened on the first day of the trial but before the trial had commenced.[3] Defendant moved for a continuance alleging that defendant was properly informed of the nature of the accusation against him only moments before the trial began and that he should be granted a continuance to afford him time to alter or supplement his defense.

Before a trial begins, the trial judge may order an indictment amended. C.Cr.P. Art. 487. So long as the amendment merely clarifies the crime charged and does not add a new crime, the amendment is proper. State v. Bluain, No. 55,799, decided on June 23, 1975; State v. Royal, 255 La. 651, 232 So.2d 465 (1970). The fact that such a clarification has been made does not necessarily prejudice the defendant. If, however, the defendant can show that he has been prejudiced in his defense on the merits by the change, the trial court must, on motion of the defendant, grant a continuance for a reasonable time. C.Cr.P. Art. 489. But this defendant failed to show in what respect his defense was prejudiced by the change. In the absence of any showing of prejudice, the trial judge properly overruled defendant's motion for a continuance. State v. Royal, supra.

This bill lacks merit.

Assignment of Error No. 3.

Defendant contends that the selection of the grand jury which indicted [illegible]

[3] [illegible] grand jury had been organized or sworn; no witness had been heard.

States Constitution. He argues that the systematic exclusion of women from these juries requires that this Court reverse the conviction.

Defendant was tried in September, 1974. On January 21, 1975, the United States Supreme Court held in Taylor v. Louisiana, ____U.S. _____, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) that the Louisiana system of requiring women to register in order to serve on juries was unconstitutional.[4] Then in Daniel v. Louisiana, ___U.S.___, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975), that same Court held that the decision in Taylor would be applied only prospectively from January 21, 1975. This Court has applied the Daniel holding in State v. Rester, 309 So.2d 321 (La. 1975) and has consistently affirmed that decision. State v. Wilson, No. 55,839, decided on June 23, 1975; State v. Williams, 310 So.2d 528 (La. 1975); State v. Devore, 309 So.2d 325 (La. 1975).

Defendant's claim of unconstitutionality because of the exclusion of women from the jury venire is without merit.

Assignment of Error No. 4.

Defendant argues that the statute under which he was convicted and

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Footnote 4.

The invalidated constitutional provision, Art. 7, §41, was operative until January 1, 1975, when the Louisiana Constitution of 1974 became effective. [illegible] not contain a provision granting women exemption [illegible] Article 402, C.Cr.P., was [illegible].

sentenced is unconstitutional in derogation of the Eighth and Fourteenth Amendments to the United States Constitution which prohibit the state from imposing cruel and unusual punishment.[5] The statute under which defendant Roberts was tried, R.S. 14:30(1), mandates the death penalty upon conviction. Defendant argues from Mr. Justice Brennan's concurrence in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) that the death penalty should be held unconstitutional per se. But the Furman decision did not hold that punishment by death was necessarily cruel and unusual.[6] And this Court has held that the death penalty imposed after conviction of first degree murder under another subsection[7] of the statute at issue here was not unconstitutional per se. State v. Hill, 297 So.2d 660 (La. 1974). In the Hill case this Court stated:

> "The death penalty for murder, when the perpetrator has the intent to kill or inflict great bodily harm on more than one person, is neither barbarous nor disproportionate to the offense. See State v. Selman, supra; State v. Crook, 253 La. 961,

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Footnote 5.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth Amendment applies this prohibition to the states.

Footnote 6.

Only two of the five justices comprising the majority, namely Justices Douglas and Brennan, [illegible] that the death penalty was cruel and unusual punishment per se under the Eighth and Fourteenth Amendments.

Footnote 7.

That subsection was R.S. 14:30(4) which reads "First degree murder is the killing of a human being: . . . (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person."

> 221 So.2d 473 (1969); 21 Am.Jur.2d, Criminal Law, §613, p. 583. In fact, the Due Process Clause of the United States Constitution sanctions the death penalty when it is imposed with due process of law.
>
> "We conclude, therefore, that capital punishment *per se* is not constitutionally proscribed." 297 So.2d at 661.

We here hold that the death penalty mandated by R.S. 14:30 after conviction under subsection (1) is not unconstitutional *per se*.

Assignment of Error No. 5.

Defendant argues that the statute under which defendant was tried and convicted is unconstitutional because the jury is empowered to return a responsive verdict of second degree murder or manslaughter, neither of which carries the death penalty. He argues that the jury, therefore, maintains the power to apply the death penalty in a discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution as they were delineated in *Furman v. Georgia*.

Under article 814 of the Louisiana Code of Criminal Procedure, the jury may render responsive verdicts for first degree murder which do not carry the death penalty. This Court has held on two occasions that the [illegible] responsive verdicts for a separate [illegible] [illegible] the death penalty is not contrary to the [illegible] Court decisions in *Furman v. Georgia*. In the case [illegible] v. [illegible], supra, the Court reversed the decision of the trial court [illegible] an indictment on the ground that the power of the jury [illegible] penalty was unconstitutional.

This Court stated:

> "As provided in the statute, the death penalty is mandatory for first degree murder. Article 817 of the Louisiana Code of Criminal Procedure, as amended by Act 125 of 1973, prohibits a qualification of the guilty verdict. If the defendant is found guilty as charged, the trial judge must impose the death penalty. The penalty cannot be applied in a discriminatory manner. See Furman v. Georgia, supra; State v. Holmes, 263 La. 685, 269 So.2d 207 (1972). It is true that Article 814, as amended by Act 126 of 1973, lists as responsive verdicts second degree murder, carrying a sentence of life imprisonment, and manslaughter, carrying a sentence of imprisonment up to 21 years. See LSA-R.S. 14:30.1; LSA-R.S. 14:31. The use of these lesser verdicts, however, is contingent upon the jury finding insufficient evidence to convict the defendant of first degree murder, with which he is charged." 297 So.2d at 662.

Likewise in the case of State v. Selman, 300 So.2d 467 (La. 1974), we affirmed a conviction for aggravated rape and the sentence of death. The Court pointed out that the Louisiana legislature, following the ruling in *Furman v. Georgia*, enacted amendments to Article 814 and 817 of the Code of Criminal Procedure. These amendments removed the possibility that a jury could qualify its verdict with the words "guilty without capital punishment." In such a case the punishment would have been imprisonment [illegible] life. [illegible] statute [illegible] presently written, if a jury brings in [illegible] guilty [illegible] of [illegible] of R.S. [illegible], [illegible] have a choice of verdicts. [illegible]

BEST COPY AVAILABLE

"If the jury finds under the facts of the case that the accused is guilty of aggravated rape, the death penalty shall be imposed. On the other hand, if the jury finds under the facts of the case that the accused is either guilty of attempted aggravated rape or simple rape, they will render a verdict of guilty for that particular crime. We must bear in mind that attempted aggravated rape and simple rape are separate and distinct crimes with separate penalty provisions for each. The fact that death is the mandatory penalty for aggravated rape but not for the responsive verdicts of attempted aggravated rape and simple rape is of no moment. The sole determining factor as to which penalty will be imposed depends upon the particular crime for which the jury finds the accused guilty, if any. Therefore, we conclude that there is no discretion in the jury for the imposition of the death penalty where the accused is found guilty of aggravated rape.

"Hence, the present death penalty in Louisiana for aggravated rape is constitutionally permissible. It does not violate the Eighth and Fourteenth Amendments to the United States Constitution."
300 So.2d at 478.

We here affirm the Hill and Selman rulings and determine that this [illegible] merit.

For the reasons assigned, the conviction is affirmed.

STATE OF LOUISIANA
VS. NO. 4479-74
STANISLAUS ROBERTS

14TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU

Gentlemen:

You have heard the evidence and the arguments of counsel. It now becomes my duty to charge you as to the law applicable to this case. I ask that you listen carefully to this charge as I read it to you, since it embodies the laws of the State of Louisiana which you must consider in your deliberations to determine the guilt or innocence of the accused.

In being selected and sworn as jurors, while you are the judges of both the law and of the facts on the question of guilt or innocence, you are required to accept the law given to you by the Court as the correct law to be applied in this case.

The defendant in this case, as in every criminal case, is presumed innocent until his guilt is established by the State by competent evidence to your satisfaction and beyond a reasonable doubt. This presumption of innocence follows the accused throughout the trial, and unless and until

it is successfully overcome by the State, which bears the burden of proving beyond a reasonable doubt each and every one of the elements of the offense charged, you cannot convict the defendant. In other words, gentlemen, the State is required to prove the defendant guilty beyond a reasonable doubt. The defendant in a criminal case is never required to prove anything.

It is the duty of the jury, in considering the evidence and in applying to that evidence the law as given by the Court, to give the defendant the benefit of every reasonable doubt arising out of the evidence or out of the lack of evidence in the case; and it is also the duty of the jury, if not convinced of the guilt of the defendant beyond a reasonable doubt, to find him not guilty.

The term "reasonable doubt" means exactly what it says. It is a doubt that is reasonable. It is a doubt for which you can give a good sensible reason for having. It is such a doubt that would influence you in your every day business transactions. It must be founded upon a real, tangible and substantial basis and one that is based on reason and common sense. It is not a mere imaginary, frivolous, or conjectural doubt.

You are the exclusive judges of the facts. This Court is not permitted to comment upon the facts in this case, and I do not intend to do so. It is for you, and you alone to determine from the evidence what facts have been proved and what facts have not been proved. Also, in reaching your conclusions, the jury alone must determine the weight and credibility of the evidence. In order to determine the

2b.

credibility of any witness and the weight to be given his or her testimony, you may take into consideration his or her manner and demeanor on the stand, his or her interest or lack of interest in the outcome of the case, his or her means of knowing the facts about which he or she has testified, the consistency or inconsistency of his or her statements, whether he or she has made statements at other times and places contrary to those made on the witness stand, and any other circumstance surrounding the giving of his or her testimony that may aid you in determining the weight to be attached to his or her statements. If you believe that any witness in this case, either for the State or for the defendant, has willfully testified falsely to any material fact for the purpose of deceiving you, then in such case you are justified in disregarding the entire testimony of such witness as unworthy of belief. Also, you have the right to accept as true, or reject as false, the testimony of any witness, or any part thereof, according to the way you are impressed with his or her truthfulness.

Instructed 2

A defendant in a criminal case is never required to take the stand and testify in his own behalf; and if he does not do so, that fact cannot be considered as any indication of guilt. However, if a defendant does testify, his testimony is subject to the same rules that apply to all other witnesses in this case.

There are two kinds of evidence which are competent, legal evidence in any criminal case. These are known as direct and circumstantial evidence. Direct evidence is testimony given by witnesses of facts which they have seen, heard

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or otherwise sensed or experienced, all forms of written or documentary evidence and any other evidence directly proving the guilt or innocence of any accused. Circumstantial evidence is evidence or facts or circumstances from which the jury might reasonably conclude that certain other facts are true that show the defendant is either guilty or innocent.

In a criminal case, guilt may be established by circumstantial evidence alone, provided it excludes every reasonable hypothesis or theory of innocence. In other words, to convict on circumstantial evidence alone, that type of evidence must be so strong as to lead you to a reasonable conclusion that the defendant could not be innocent. This rule applies only when the conviction depends entirely on circumstantial evidence, in the absence of any direct evidence on the subject. It is entirely within your province to determine whether the evidence offered is direct or circumstantial and whether it is sufficient to establish the guilt of the defendant under the rules stated in this charge.

We shall now discuss expert witnesses. Expert witnesses are persons who are learned in a particular science or profession. They are permitted to express their opinion upon matters pertaining to the field in which they are trained. The relative weight and sufficiency of expert testimony, however, is peculiarly within your province as a jury to decide, considering the ability and training of the witness, his actions upon the witness stand, the weight and process of reasoning by which he has supported his opinion, the relative opportunities for study or observation of the matters about which he testifies and any other matters which serve to

illuminate his statements. You may deal with such an opinion as you please--giving it credence or not, as your own experience or general knowledge of the subject may dictate.

In presenting their arguments to the jury, the attorneys who are participating in the trial may discuss the facts as well as the law, and in discussing the evidence it is proper for them to state to you the conclusions which they have reached as to what facts have been proved and what facts have not been proved. A statement made by a lawyer during the course of his argument relating to the facts in this case, however, does not constitute evidence or proof of those facts, and it is not to be considered by you as evidence. It is simply the lawyer's interpretation of what the evidence establishes. You, of course, should carefully consider all of the arguments presented by counsel, and then with equal care you should analyze the evidence presented during the trial upon which those arguments are based.

In this case, the defendant is charged with the crime of first degree murder. An indictment has been returned by the Grand Jury of the Parish of Calcasieu charging him with this offense. No person can be prosecuted for a capital offense in this State unless he is so charged in a bill of indictment. The Grand Jury is an accusatory body only and they are required to hear only the evidence for the State, upon which evidence they returned the indictment. I charge you, gentlemen, that the indictment is merely an accusation of an alleged crime, and is not to be considered as evidence pointing to the guilt of the accused.

The bill of indictment charges:

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"THAT Toney Roberts, amended May 22, 1974, to: Stanislaus Roberts at the Parish of Calcasieu on or about the 18th day of August in the year of our Lord, One Thousand Nine Hundred and seventy-three (1973) did unlawfully with the specific intent to kill or to inflict great bodily harm, while engaged in the armed robbery of Richard G. Lowe, commit first degree murder by killing one Richard G. Lowe, in violation of Section One (1) of LSA-R.S. 14:30."

There are certain facts that must be proved by the State to your satisfaction and beyond a reasonable doubt before you can return a verdict of guilty in this case.

First, the State must prove that a crime was committed and that it was committed within the Parish of Calcasieu.

Second, the State must prove that the alleged crime was committed by Stanislaus Roberts, the person named in the indictment, and on trial in this case.

Third, the State must prove that Richard G. Lowe, the person named in the indictment as having been killed, was in fact killed.

Fourth, the State must prove that the killing occurred while the defendant was engaged in an armed robbery.

Fifth, the State must prove that the killing occurred on or about the date alleged in the indictment, although I charge you that it is not necessary that the State prove the exact date alleged in the indictment.

Sixth, The State must prove that the offense committed was murder.

First degree murder is defined in LSA-R.S. 14:30 as follows:

"First degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; . . ."

The indictment in this case charged Stanislaus Roberts under the statute. The State then, under this indictment, must prove that the killing was unlawful and done with a specific intent to kill or to inflict great bodily harm and done when the accused was engaged in the perpetration of armed robbery.

Armed robbery is defined in LSA-R.S. 14:64 as follows:

"Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon."

- theft 211 So 2d 273

Theft includes the taking of anything of value which belongs to another without his consent. An intent to deprive the other permanently of whatever may be the subject of the taking is essential.

Specific Intent

A "dangerous weapon" is defined by the law of Louisiana as "any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm".

The test of a dangerous weapon is not whether the weapon is inherently dangerous, but whether it is dangerous "in the manner used". Whether a dangerous weapon was used in this case is a question to be determined by the jury in considering: (1) whether a weapon was used; (2) the nature of the weapon if so used; (3) and the manner in which it may have been used; under the law and definition referred to above.

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To constitute the crime of first degree murder, the offender must have a specific intent to kill or inflict great bodily harm, and this "specific intent" must actually exist in the mind of the offender at the time of the killing. If a human being is killed, when the offender is charged under this statute, but at the time of the killing, the offender did not have a specific intent to kill or inflict great bodily harm, then, the killing could not be murder in the first degree, although it might be murder in the second degree, manslaughter, justifiable homicide or an accident. The specific intent to kill or to inflict great bodily harm not only must exist at the time of the killing, but it must also be felonious, that is, it must be wrong or without any just cause or excuse.

I charge you that it is not necessary that this specific intent should have existed in the mind of the offender for any particular length of time before the killing in order to constitute the crime of murder. If the will accompanies the act, that is, if the specific intent to kill or to inflict great bodily actually exists in the mind of the offender at the moment of the killing, even though this specific intent was formed only a moment prior to the act itself which causes death, it would be as completely sufficient to make the act murder as if the intent had been formed on the previous day, an hour earlier, or any other time.

The law also requires that when an offense is charged which includes lesser offenses, the Court shall charge you on the law applicable to the lesser offenses of which the accused could be found guilty under the indictment.

The law provides that in a trial of murder in the first degree, if the jury is not convinced beyond a reasonable doubt that the accused is guilty of the crime of murder in the first degree, but is convinced beyond a reasonable doubt that he is guilty of murder in the second degree, it should render a verdict of guilty of murder in the second degree. It is necessary, therefore, that I instruct you as to the law relating to murder in the second degree.

Murder in the second degree is defined in Revised Statutes 14:30.1, as follows:

> "Second degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm; or
>
> (2) When the offender is engaged in the perpetration of attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he had no intent to kill."

Under the above defined law, murder in the second degree is defined as the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm but is not engaged in committing an armed robbery. Murder in the second degree is also defined as the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of armed robbery even though the offender had no intent to kill.

The law requires that I also charge you on the law relating to manslaughter, an offense of less magnitude or grade.

Manslaughter is a homicide committed without intent to cause ~~or~~ death or great bodily harm:

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(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in article 30 or article 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous.

I have already charged you that murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of armed robbery. Part of the definition of manslaughter given above involves a case when the offender is engaged in the perpetration or attempted perpetration of any other felony than that mentioned in the definition of murder under articles 30 and 30.1 or of any intentional misdemeanor directly affecting the person. A felony is a crime that may be punishable by death or by imprisonment at hard labor. A misdemeanor is any crime that is not a felony.

If you should conclude that the defendant is not guilty of murder in the first degree, but you are convinced beyond a reasonable doubt that he is guilty of murder in the second degree it would be your duty to find that defendant guilty of murder in the second degree.

If you should conclude that the defendant is not guilty of murder in the first degree or murder in the second degree, but you are convinced beyond a reasonable doubt that he is guilty of manslaughter, it would then be your duty to find the defendant guilty of manslaughter.

If you should conclude that the defendant is not guilty of murder in the first degree, or murder in the second

degree or manslaughter, it would then be your duty to find the defendant not guilty.

To summarize, you may return any one of the following verdicts:

1. Guilty as charged.
2. Guilty of second degree murder.
3. Guilty of manslaughter.
4. Not guilty.

Accordingly, I will now set forth the proper form of each verdict that may be rendered, reminding you that only one verdict shall be rendered.

If you are convinced beyond a reasonable doubt that the defendant is guilty of the offense charged, the form of your verdict should be: "We, the jury, find the defendant guilty as charged."

If you are not convinced beyond a reasonable doubt that the defendant is guilty of murder in the first degree but you are convinced beyond a reasonable doubt that the defendant is guilty of murder in the second degree, the form of your verdict would be: "We, the jury, find the defendant guilty of second degree murder."

If you are not convinced beyond a reasonable doubt that the defendant is guilty of murder in the first degree or murder in the second degree, but you are convinced beyond a reasonable doubt that the defendant is guilty of manslaughter, the form of your verdict would be: "We, the jury, find the defendant guilty of manslaughter."

If you are not convinced that the defendant is guilty of murder in the first degree, murder in the second

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degree or manslaughter, the form of your verdict would be: "We, the jury, find the defendant not guilty."

The law requires that I give you a written list of verdicts which are responsive to the crime charged in this case, with each of the responsive verdicts separately and fully stated. I have prepared such a list and it will be handed to you, and when you retire to the jury room you must take it with you.

All twelve of you must agree to any verdict that is rendered in this case. Until all twelve of you do agree on the verdict, the Court cannot accept the same.

When you retire to the jury room, you will select your own foreman. After you have arrived at your verdict, your foreman will write the verdict on the back of the list of verdicts which you will take with you into the jury room.

First, you will write the date. Under the date he will write the verdict, which, as I have said, must be one of those appearing on the written list. Under the verdicts the foreman will sign his name, and under his signature he will write the word "Foreman".

In deliberating on and arriving at a verdict, you should give this case the same careful and deliberate consideration you would give to any other serious or important matter in life, and the verdict you return should be one which completely satisfies your mind and conscience that to the very best of your ability you have interpreted the facts and have applied the law truly, correctly and impartially.

Notify the deputy sheriff who will be attending the jury when you are ready to return your verdict in open court.

Now, gentlemen, you may retire to the jury room to deliberate on your verdict.

_____
DISTRICT JUDGE

Lake Charles, Louisiana
September _____, 1974.

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STATE OF LOUISIANA
VS. NO. 4479-74
STANISLAUS ROBERTS

14TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU

RESPONSIVE VERDICTS

Gentlemen of the Jury:

The following is a list of the possible verdicts, only one of which may be returned in this case. After you have arrived at a verdict your foreman, on the back of this page, will write the date, below that, the verdict you have reached and below the verdict your foreman shall sign his name. Below his signature he shall write the word "Foreman".

1. _____, 1974.

We, the jury, find the defendant guilty as charged.

_____
FOREMAN

2. _____, 1974.

We, the jury, find the defendant guilty of second degree murder.

_____
FOREMAN

3. _____, 1974.

We, the jury, find the defendant guilty of manslaughter.

_____
FOREMAN

4. _____, 1974.

We, the jury, find the defendant not guilty.

_____
FOREMAN

_____
DISTRICT JUDGE

Lake Charles, Louisiana

September _____, 1974.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975
NO.

_____

STANISLAUS ROBERTS,
Petitioner

vs.

STATE OF LOUISIANA,
Respondent

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Petitioner, STANISLAUS ROBERTS, moves the Court for an order permitting him to file this petition for writ of certiorari to review the decision of the Louisiana Supreme Court entered herein on the 5th day of September, 1975, in forma pauperis, and in support thereof attaches the affidavit of said petitioner.

Richard P. Ieyoub

RICHARD P. IEYOUB
P. O. Drawer 2001
Lake Charles, LA 7060[illegible]
Attorney for Petitioner

O R D E R

LET the petitioner proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____
SUPREME COURT JUSTICE

lc

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO.

STANISLAUS ROBERTS,

Petitioner

vs.

STATE OF LOUISIANA,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, STANISLAUS ROBERTS, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to file this petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor and that I believe I am entitled to redress.

Stanislaus Roberts

STANISLAUS ROBERTS

SWORN TO AND SUBSCRIBED before me this 2nd day of December, 1975.

Richard P. Lazarus

NOTARY PUBLIC